o. 15657

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NRIQUE MEDINA FERNANDEZ, GINAS
MINEZ NORTES, VICTOR RODRIGUEZ,
ANUEL FERNANDEZ RODRIGUEZ and
UGUSTIN CABRERA OROZA,

Appellants,

vs.

HARLES C. HARTMAN, and
LBERT DEL GUERCIO,

Appellees.

APPEAL FROM
UNITED STATES DISTRICT COURT FOR THE
OUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISI
HON. THURMOND CLARKE, PRESIDING

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

I.
THE MANIFEST INTENTION OF THE PARTIES TO THE 1902 TREATY WAS TO CONFINE APPLICATION OF ARTICLE XXIV THEREOF TO DESERTIONS OCCURRING WITHIN THE ASYLUM COUNTRY.

A.
The Language of Article XXIV is Unambiguous, and Fully Defines The Reach Which The Parties Thereto Intended to Give It.

Without quite saying so, Respondents [1/] strain for a

1/ The use of the term "respondents" herein instead of appellees is to avoid confusion with the term "appellants".

broader than that clearly indicated, manifestly its scope must stop at our borders. Under no construction that is fair and reasonable could Article XXIV be stretched to embrace seamen deserting beyond the territorial limits of the United States (United States v. Curtis-Wright, 299 U. S. 304; The Apollon, 22 U. S. 159).

Moreover, under this treaty, seamen may be arrested without a warrant, and detained without a hearing. Even aliens are entitled to due process of law (Kwong Hai Chew v. Colding, 340 U. S. 590), and it cannot be assumed, in the absence of a more precise mandate, that the United States obligated itself to the application of such harsh and offensive measures beyond the limits of practical necessity (52 Am. Jur., §34, p. 826).

The government argues, however, that under appellants' theory, "... it would only be necessary for a crewman while on shore leave to pass beyond the geographical limits of the port' to immunize himself from arrest." (Emphasis supplied). Respondents overstate the alternative. Alien seamen are always amenable to arrest by the Immigration Service for violation of the United States immigration laws (See: Immigration and Nationality Act, §§251-257; 8 U. S. C. A. §§ 1281-1287). But we are dealing here with the applicability of a treaty provision, the arrest and detention provisions of which depart markedly from our traditional concepts of due process

and equal protection of the laws. Thus, the draftsmen of the 1902 treaty assigned the task of administering Article XXIV only to those officials located within the city limits of the port; and enforcement of this provision need not - and does not - befall the duty of officials throughout the United States unless the parties to the treaty say so much more explicitly than they have here.

Finally, respondents argue that appellants deserted in San Diego in any event because they acquired permission to leave the ship by fraud which vitiated their leave status at its inception (Resp. Br. p. 9). This contention would be better served had appellants been charged with criminal conspiracy which makes punishable an unlawful agreement whether or not the contemplated crime is consummated (United States v. Boyer, 331 U. S. 532, 542). However, the allegedly fraudulent procurement of their leave would go only to the question of intent, whereas the offense of desertion, as we pointed out in our opening brief (pp. 20-24), requires, additionally, the overt act of absence without leave. Appellants may very well have changed their minds several times before actually overstaying their leaves with an intention not to return (See: R. 40, 57.) Indeed, appellant RODRIGUEZ did just that in Panama (R. 39.) Thus, the offense of desertion could not be complete until appellants' leave had expired which, in this case, did not occur until they reached a point far beyond the city limits

of San Diego.

The cases relied upon by respondents as supporting their fraud theory (Resp. Br. p. 9) [4/] are distinguishable for the reason that the courts there were reaching "stealthy encroachments against the constitutional rights of citizens" by public officials, in order to effectuate public policy against unreasonable searches and seizures (Fraternal Order of Eagles No. 778 v. United States, 57 Fed. 2d 93, 94). Nor is respondents' reference to the Manual for Courts-Martial of the United States relevant here, because that treatise is concerned only with desertions from the United States military forces; and furthermore, because it cannot be said that appellants committed an act inconsistent with their leave status until they crossed the border into Mexico - at which point the Treaty of 1902 became inapplicable.

4/ Gouled v. United States, 255 U. S. 298;

Fraternal Order of Eagles, No. 778 v. United States, 57 Fed. 2d 93.

B.

The Construction of Article XXIV Urged By Appellants Does Not Jeopardize the 1902 Treaty, or Any Other.

In its preliminary statement, the Government pleads for a ruling upholding the 1902 Treaty in that the United States has similar treaties with Greece and Columbia. (Resp. Br. p. 7). An adverse ruling, so the argument runs, "might cause other nations to become apprehensive that our judiciary will not honor similar agreements with them; and that they might be 'entirely stripped of their crews in '" United States ports (Tucker v. Alexandroff, 183 U. S. 424, 430) (Resp. Br. p. 8).

Any such apprehension would be entirely unfounded. Examination of our commercial treaties with Greece and Colombia, as well as that with Russia involved in Tucker v. Alexandroff, supra, all contain language providing for the arrest and detention of deserting seamen of the respective countries wherever in the United States they may be found. 5/

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5 / Thus: Article XIII of the Convention between Greece and the United States of 1902 (proclaimed in 1903), (33 Stat. 2122, 2131), authorizes the "arrest, detention and imprisonment of the deserters from the ships at war and merchant vessels of their country . . ."

The treaty with Russia, found in Tucker v. Alexandroff, supra, at p. 429, contained the identical provision.

And Article XXXIII of the Treaty with New Granada (Colombia) of 1846, 9 Stat. 881, 896, permits "the arrest, detention and custody of deserters from the public and private vessels of their country . . ."

II

THE EXTRADITION TREATY, AND PARTICULARLY ARTICLE III THEREOF, IS APPLICABLE TO THE CASE AT BAR.

A.

Article III is Not Limited To Crimes Enumerated in the 1904 Treaty, But By Its Express Terms, Applies to Any Demand Made By Spain For Return of Its Citizens.

Respondents contend that the Extradition Treaty of 1904 is, by definition, inapplicable to the case at bar, thereby rendering it unnecessary to consider appellants' claims that their "desertion" was of a political character (Resp. Br. pp. 14-15). This argument hangs by the notion that the appearance of Article III in a treaty denominated by, and using the term "Extradition" confines its application to those crimes enumerated in that convention which were committed upon territory of the demanding state. 6/

The Government's reliance upon Terlinder v. Ames (184 U. S. 270, 276) to support its thesis is misplaced. Both the treaty and the statute involved in Terlinder expressly

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6 / Under this definition, of course, respondents' theory that appellants' desertion commenced on board their ship by virtue of their concealment of their plans (Resp. Br. 9), places appellants' desertion on Spanish territory and thus, within the Extradition Treaty as well (I Moore, on Extradition, p. 136).

preclude the forcible repatriation of persons accused of political crimes; it also constitutes an acknowledgment that such policy pre-dated the treaty. This is understandable, for when the Extradition Treaty was finally proclaimed (in 1908), the Statue of Liberty - itself a recognition of our historical traditions - had already been welcoming the oppressed of other lands for twenty-four years. Thus, to narrow the scope of Article III so as to exclude "deserting" seamen whose only crime is their love of liberty, is to drain that provision of its history and purpose. To paraphrase Chief Justice Goddard in Ex Parte Kolczywski: 7/

> "The evidence about the law prevalent in [Franco Spain] today shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary [desertions] which have no political significance will be thereby excused."

In the absence of far more convincing treaty language than that which appears at bar, it is inconceivable that the

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7 / Case of the seven Polish seamen: 1954, 2 Weekly Law Reports, 116 (1955); 1 ALL. E. R. 31; cited in Karadzole v. Artukovic (CCA 9) 247 Fed. 2d 198, at p. 203).

mere procedure for restoring a fugitive to the jurisdiction of the demanding state, rather than the character of his crime, was intended to control the applicability of Article III (See: Valentine v. United States, supra). We submit, therefore, that Article III of the 1904 Extradition Treaty is applicable to the case at bar.

B.

Treaties, Like Statutes, Are Subject To Judicial Construction, And To Hold That Article III Bars Spain's Right to Reclaim Appellants In No Sense Constitutes A Political Decision

At the outset, it must be noted that respondents do not deny that Spain is controlled and dominated by a ruthless dictator, who for twenty years has crushed all religious and political dissent by force and violence; or that appellants abandoned their ships in order to escape from Franco Spain, and seek freedom elsewhere; or that their forcible repatriation to Spain would subject them to physical persecution and possible death because of what they have said and done about Franco. 8/

8/ See App. Br. pp. 32-33, and Appendix A and B. NOTE: Appellants gratefully acknowledge their indebtedness to Drs. Victoria Kent (of New York), Dwight L. Bolinger, Jacques C. Antoine, and Laudelino Moreno (of Los Angeles), for furnishing material and facts about conditions in Franco Spain.

The Government's only reply to all this is that the recognition of Spain by the United States bars judicial inquiry into the character of that regime (Resp. Br. pp. 16-17). This argument is a non sequitur. Although the Court undoubtedly has the power to compel the Attorney General to exercise his discretion where he is under a duty to do so, 9/ that is not the issue here. Nor is this Court being asked to interfere with a political decision of the executive or legislative branches of government. 10/

The question at bar is whether Spain has a legal right to demand appellants' repatriation, and the correlative duty of the United States to comply therewith. Accordingly, "to determine the nature and extent of the right," this Court must look at the treaties which create or delimit it (Factor v. Laubenheimer, 290 U. S. 276, 287.) Thus, recognition of Yugoslavia by the United States, and the existence of several

---

9/ See Savala-Cisneros v. Landon, 111 Fed. Supp. 129, 131; cf. Williams v. Fanning, 332 U. S. 490.

10/ Because no such decision has been made. However, there is a question as to whether a decision to remand appellants to Franco Spain would not constitute a deprivation of appellants' right to life and liberty without due process of law under the Fifth Amendment to the United States Constitution, particularly in view of our public policy against the forcible return of political refugees to totalitarian regimes where there is a likelihood they will suffer political persecution there (See: App. Br. pp. 29-35.) (cf. Valentine v. United States, 299 U. S. 5, 9).

mutual defense pacts between the two nations, [11/] did not preclude this Court from holding that under an extradition treaty, a Yugoslav citizen was not extradictable as a war criminal because his crimes were of a political character (Ivancevic v. Artukovic, 211 Fed. 2d 565; cert. denied), 348 U. S. 818; Karadzole v. Artukovic, 247 Fed. 2d 198).

The point is, that the United States has not refused to grant appellants political asylum. Rather it has studiously avoided reaching that question by insisting that the government is bound by the 1902 Treaty to deliver appellants to Spain because Article III of the Extradition Treaty is inapplicable. It is reasonable to infer that the same rationale served as the basis for the District Court's order. In view of the political

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11/ See: Agreement governing the furnishing of assistance under the Yugoslav Emergency Relief Assistance Act of 1950, signed at Belgrade January 6, 1951 (2 U. S. T. 13; T. I. A. S. 2174; 122 U. N. T. S. 137); Agreement relating to supplies of food for Yugoslav armed forces, furnished under the Mutual Defense Assistance Act, entered into force November 21, 1950 (I. U. S. T. 753; T. I. A. S. 2145); Agreement relating to the furnishing by the United States to Yugoslavia of raw materials and other supplies to support the material requirements of the Yugoslav armed forces - entered into force April 17, 1951 (2 U. S. T. 2254; T. I. A. S. 2349); Agreement regarding military assistance, signed at Belgrade, and entering into force on November 14, 1951 (2 U. S. T. 914; T. I. A. S. 2245); Agreement relating to the disposition of redistributable and excess military assistance property in Yugoslavia, entered into force May 22, 1955; Agreement relating to special program of facilities assistance pursuant to the military assistance agreement, entered into force September 30, 1955 (T. I. A. S. 3370).

character of appellants' offense, however, it is plain that Article III of the 1904 Treath denies Spain a right to claim appellants, and in the event a claim is made, relieves the United States of any duty to honor it. 12/

III.

RESPONDENTS ARE WITHOUT JURISDICTION TO DETAIN APPELLANTS OR TO DELIVER THEM TO THEIR SHIPS.

As suggested in Appellants' Opening Brief (beginning p. 36), there are at least four reasons why respondents have never acquired, and do not now have, jurisdiction to detain appellants or to deliver them to their ships pursuant to the 1902 Treaty. First, respondents lacked the requisite statutory authority for paroling appellants into the United States; Second, by virtue of their parole, appellants are still in

12/ Although not heretofore referred to, judicial cognizance should also be taken of the Constitution of the International Refugee Organization, to which the United States is a signatory party (62 Stat. 3037), which defines as political refugees inter alia:

> (b) Spanish Republicans and other victims of the falangist regime in Spain, whether enjoying international status as refugees or not:
>
> (Annex I, Part I, Section A-1 (b), - 62 Stat. 3049)

By this agreement, the United States has pledged its assistance in relocating political refugees from Spain "until the time when a democratic regime in Spain is established" (62 Stat. 3038).

Mexico in contemplation of law, and so respondents do not have jurisdiction over their persons such as to enable them to give effect to the 1902 Treaty; Third, appellants voluntarily entered the United States as a result of fraud, deception and unlawful exercise of authority by respondents' subordinates; and Fourth, the government was without power to seize and detain appellants.

We now proceed to meet the government's counter-arguments on these points:

A.

Appellants Were Unlawfully Paroled Into The United States.

1.

Respondents Attempted to Parole Appellants Into The United States, and Whether or Not Appellants Were Deported From Mexico is Irrelevant.

Respondents advance the amazing theory that appellants were not paroled into the United States "since on July 5, 1957 appellants were deported from Mexico," and "having thus been deported, appellants were lawfully in the custody of the United States Immigration and Naturalization Service ..." (Resp. Br. p. 18).

We fail to see how appellants' alleged deportation by Mexico conferred jurisdiction upon respondents. It had been

our assumption that only laws of the United States could do that (Valentine v. United States, supra, p. 9; Semble; Federal Trade Commission v. Raladam Co., 283 U. S. 643). And United States statutes are quite clear on the subject: Any alien not in possession of a valid immigration visa or entry permit "shall be excluded from admission into the United States" (Emphasis supplied) (8 U. S. C. A. §§ 1181 (a), 1182 (a) (20); 8 C. F. R. 211. 1, et seq. and 235. 1 et seq). Obviously, United States Immigration officials could not admit appellants into the United States, unless empowered by law to do so. Whatever may have been respondents' manifest intentions (Resp. Br. p. 19) §212 (d) (5) of the Immigration and Nationality Act (8 U. S. C. A. 1182 (d) (5)) is the only law to our knowledge which permits the entry of aliens without valid immigration documents - and then, only under special emergent circumstances. Irrespective of whether or not the Immigration Service contemplated an application of §212 (d) (5), that was the document which they in fact selected, and the only law under which they had authority to act. Respondents' claims that they could have invoked other authority to effect appellants' entry into the United States may therefore be disregarded, since they point to none (Resp. Br. 18-19).

There Is No Competent Evidence In The Record At Bar Of Appellants' Deportation from Mexico.

Nevertheless, respondents deposit so much of their reasoning upon the alleged deportation of appellants by Mexico, that we pause briefly to expose the error of this claim.

The only evidence of alleged deportation is Exhibit "G", consisting simply of a letter written in Spanish by an official of the Mexican Immigration Service to a United States Immigration officer, purporting to state that appellants were deported from Mexico pursuant to an Order of the Secretary of Interior of Mexico. This exhibit was received into evidence, untranslated, [13/] over the vigorous objections of appellants (R. 87-88). The utter incompetency of that document as evidence of a deportation is manifest:

First, it is replete with bare legal conclusions, is not the best evidence, and is not even an official certificate such as might come in under an exception to the hearsay rule.

> "The general governing rule is that official certification of a fact drawn or gathered from a public record is a mere legal conclusion, or

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13/ Counsel for appellants did not see this document until shortly before it was introduced into evidence; and did not obtain an accurate translation thereof until after the trial (See: R. 86).

the opinion of the certifying officer, and so not admissible as evidence. He should copy the record verbatim, certifying that he has done so, and that the copy is an accurate transcript of the original." (U. S. Slicing Mach. Co. v. Wolf, Sayer & Heller, Inc., (D. C. Ill., 1917), 243 Fed. 412, 413; aff'm'd 257 Fed. 93). 14/

Secondly, no foundation was laid for the receipt of the exhibit into evidence since the document was not translated, and its admission in that form deprived appellants of their right of confrontation (V Wigmore On Evidence (3rd Ed), §1393, p. 117).

And thirdly, no foundation was laid, and it does not appear therefrom, as to whether the officer who signed the letter was the custodian of the records from which the alleged facts were drawn (See: Esnault-Pelterie v. Chance Vought

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14/ Accord: United States v. Grabina (CCA 2d, 1941), 119 Fed. 2d 863, 865 (certification by Mayor of Polish town declaring records revealed party was married there, held inadmissible); In Re Asterios Estate (1939), 16 N. Y. S. 2d 943, 945, 172 Misc. 1081 (Certificate by Mayor of Greek town as to persons and births appearing in Municipal Registry, held inadmissible); Pekin Cooperage Co. v. State (Sup. Ct. Ark.), 197 Ark. 341, 122 S. W. 2d 468, 470 (Certificate by Secretary of State that corporation did not exist, held inadmissible).

Corp. (D. C. N. Y. 1932) 56 Fed. 2d 393, 396, aff'm'd 66 Fed. 2d 474).

Clearly, then, D'Agostino v. Sahli (230 Fed. 2d 668 (5th Cir. 1956)), must be distinguished from the case at bar, since there is no competent evidence before this Court that appellants were deported from Mexico, or that the Mexican Government officially cooperated in their surrender to American authorities. Indeed, the official position of Mexico belies any such inference.

B.

The 1902 Treaty Is Inapplicable Because Appellants Are Legally Still in Mexico And Therefore Beyond Its Reach.

From the foregoing discussion, it is apparent that appellants were paroled into the United States (albeit unlawfully), in legal consequence of which they are still in Mexico. Accordingly, they are beyond the reach of the 1902 Treaty, and cannot be delivered to their ships. (See App. Br. pp. 36-44).

Respondents seek to avoid this result by arguing that appellants were "never legally admitted to Mexico," and that "mere temporary presence in that country would not be effectual to place their juridical persons there." (Resp. Br. p. 20).

Although there is no competent evidence in the record at bar bearing on whether or not appellants were "legally admitted to Mexico," neither their alleged illegal entry therein or the duration of their stay there defeats their status as subjects of Mexico. Appellants entered Mexico for the avowed purpose of establishing a domicile, and with the intention to remain there (See: e.g., R. 53, 55, 62). Absent evidence to the contrary, it was unnecessary for appellants to obtain authorization from Mexico in order to acquire a new domicile in that country (Harral v. Harral, 39 N. J. Eq. 279). Furthermore, their length of residence, no matter how brief, is irrelevant once domicile has been established (Schillerstrom v. Schillerstrom, 75 N. D. 667, 32 N.W. 2d 106; 17 Am. Jur. §20, p. 603). Having thus successfully acquired domicile in Mexico, appellants - even though strangers - placed themselves under the protection of Mexican sovereignty (See: Fong Yue Ting v. United States, 149 U. S. 698, 724). Since under United States law, and by the term and conditions of their parole (See: Exhibit 1), appellants have never legally entered the United States, it follows they are yet in Mexico, under the protection of the sovereignty of that country. (Compare: Fong Yue Ting v. United States, supra, p. 724). Respondents therefore can apply the 1902 Treaty to appellants - i. e., seize and detain them - only by "kidnapping" them from Mexican territory. Since the United States has an extradition treaty

with Mexico (31 Stat. 1818), appellants' recovery must be sought by adhering to the procedures provided in such treaty (Cook v. United States, 288 U. S. 102, 120-122; United States v. Ferris, 19 Fed. 2d 925; Collier v. Vaccaro, 51 Fed. 2d 17).

In the meanwhile, the 1902 Treaty being inapplicable, appellants must be restored to Mexican territory by virtue of the "parole" statute (8 U. S. C. A. §1182(d) (5); See also: United States v. Rauscher, 119 U. S. 407). Respondents are without authority to dispose of them in any other way.

The fact that the 1902 Treaty does not require a crewman to be "within the United States" is beside the point (Resp. Br. p. 21). As we said in our opening brief, that treaty can be operative only within the territory of the signatory countries, and only upon the persons found therein (App. Br. pp. 41-42). Whether a deserter would ordinarily be "within the United States" in legal contemplation is not before this Court, although the means of dealing with such persons is amply provided for by our statutes. 15/

15/ See: §§251-257, Immigration and Nationality Act, (8 U. S. C. A. §§1281-1287).

C.

Respondents Did Not Acquire Jurisdiction Over Appellants In That The Latter Entered The United States Only Because of The Deception, Fraud and the Unlawful Exercise of Authority by Respondents' Subordinates and Agents.

Jurisdiction over an alien is had by the Immigration Service when he is found in territory of the United States. But it cannot be said that he is so found there when the alien is enticed into American territory by fraud, trickery or illicit practices of the Immigration Service, or persons acting in its behalf (cf. Blandin v. Ostrander, (CCA 2, 1917), 239 Fed. 700). Jurisdiction cannot be invoked by ruse or by misuse of a statutory authority, since it would then rest upon fraud or some other illegal act (Blandin v. Ostrander, supra).

Appellants had not violated any law of the United States, nor were they accused of such offense (compare: D'Agostino v. Sahli, 5th Cir., 1956), 230 Fed. 2d 668). Yet, an officer of the United States Navy accompanied the Spanish captain of the "El Mirante Ferrandiz" across the border to enable the latter to persuade appellants to return to their ships (R. 91, 92). Why the United States Navy found it necessary to lend its prestige to the Spanish captain is not fully explained by the record. 16/

16/ The government simply says that the officer went as a "guide". See: Answer, Para II (y), at p. 2, line 17).

When, however, that effort proved unsuccessful, officers of the United States Immigration Service whisked appellants from Mexican territory by means of an Order of Parole (Exhibit 1). This was accomplished before either respondents or their subordinates had received a written demand from the Spanish Consul, and prior to their receipt of a manifest from the captain of the deserted ships (App. Br. p. 14, fn. 21).

Moreover, while such Order of Parole required an application by appellants for permission to enter the United States, respondents concede that none was obtained (Resp. Br. p. 19; See also, R. 24-25).

Although respondents now deny that they intended Exhibit I to serve as an Order of Parole (Resp. Br. p. 19), their subordinates apparently felt the necessity of securing the signature of appellant ENRIQUE FERNANDEZ thereto. The uncontroverted evidence shows how this was accomplished:[17]

> "Q by Mr. Wirin: Now, I show you Petitioners' Exhibit No. 1 and call your attention to a writing which reads "Enrique Medina" on the reverse side and ask you if that is your handwriting?
>
> A. Yes. It is my handwriting.
>
> Q. Where was the document signed?

17/ At R. 58-59.

A. In the American Immigration.

Q. How many American Immigration officers were there, at the time you signed this paper?

A. One only. There was a man there.

Q. Did he read this paper to you before you signed it?

A. No.

Q. Did you know what you were signing?

A. BY THE WITNESS: No.

THE INTERPRETER: "No."

Q. By Mr. Wirin: Can you read English?

A. THE WITNESS: No.

THE INTERPRETER: "NO."

Q. By Mr. Wirin: What did you understand that you were signing?

A. Well, I don't know; I did not know anything about it. I thought something about the ship, where they were going to send me. I did not understand it; I did not understand it at all.

Q. Did you, at any time, when you were in custody of United States Immigration, on July 5, 1957, desire to come into the United States from Mexico?

A. No, I wanted to go to Mexico."

All the surrounding circumstances considered, it is

submitted that the entry of appellants into the United States did not confer jurisdiction upon the respondents to seize or detain them under the 1902 Treaty.

D.

Respondents Were Without Power To Seize Appellants, And Therefore Are Without Power to Detain Them, or Deliver Them To Their Ships.

There is, however, a more fundamental jurisdictional defect which the government has chosen to ignore. Respondents relied upon the 1902 Treaty as authority for their seizure and detention of appellants as deserters. As previously stated, however, a treaty is applicable and enforceable only within the territorial limits of the signatory nations (United States v. Curtis-Wright, 299 U. S. 304; The Apollon, 22 U. S. 159 (9 Wheat 362). As a matter of fact, it is clear from the language of Article XXIV of the 1902 Treaty that no more was intended by either party thereto. This being so, Article XXIV confers jurisdiction upon competent officials of the asylum state to arrest and detain only those deserters actually found in their country.

Yet, it is evident from previous discussion that appellants were found in Mexico - not only in the sense of discovery, but within the meaning of seizure. That is to say, appellants were paroled by respondents into the United States against their will,

in violation of American law, and without consent of the Mexican government. Moreover, Spanish authorities had themselves failed, at that point, to comply with the provisions of Article XXIV requiring the submission in writing of a demand, accompanied by the ship's manifest, to the arresting officers. In short, though purporting to act under the 1902 Treaty, respondents failed to conform to its provisions and limitations.

Here, then, we have a case falling squarely within the principle of Cook v. United States, 288 U. S. 102. There, the Coast Guard seized the Mazel Tov, a British vessel carrying contraband while hovering eleven and a half miles off our coast. Such seizure was authorized under then existing United States law empowering the Coast Guard to board any vessel suspected of carrying illicit merchandise, within four leagues (twelve miles) of the coast, and if upon search and examination of the cargo it appeared that any United States law was violated, the vessel or merchandise was liable to forfeiture. A treaty between the United States and Britain, however, authorized such boarding and search of British vessels only one hour's distance from shore. Since the Mazel Tov was capable of speeds of only ten miles per hour, the seizure was held unlawful. In so holding, Justice Brandeis declared for the majority:

"The objection to the seizure is not that it was

wrongful merely because made by one upon whom the government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the treaty it had imposed a territorial limitation upon its own authority."
(P. 121).

The theory behind Cook seems to be that the United States had limited its sovereignty, respecting the ship Mazel Tov, to a point ten miles from shore. Obviously, the Coast Guard could not claim a power which the United States government had itself forsaken.

So here, the United States has delimited its sovereignty in two respects: First, by the terms of Article XXIV of the 1902 Treaty; and Second, by its Extradition Treaty with Mexico. 18/ Both of these treaties provided for the exclusive remedy for the recapture of fugitives. It is true that the failure to comply with the 1902 Treaty did not offend Spanish sovereignty. But it is no less true that the failure of the United States to resort to its Extradition Treaty with Mexico in seeking to capture a fugitive residing there offended Mexican sovereignty (Valentine v. United States, supra; United States

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18/ Extradition Treaty of 1899 between Mexico and the United States, 31 Stat. 1818.

v. Rauscher, 119 U. S. 407, 419-421; Collier v. Vaccaro, 51 Fed. 2d 17.) Therefore, once appellants had reached Mexico, respondents' only recourse was to obtain their return by making proper demand upon Mexico under the Extradition Treaty of 1899. Since, however, respondents, and their subordinates, took matters into their own hands, without resort to the diplomatic procedures provided in the treaty with Mexico, they thereby exceeded the limits of national sovereignty which the United States had imposed on itself. It follows that respondents were without power to seize appellants from Mexican territory. And absent a power to seize, jurisdiction could not be conferred upon the arresting officers simply because they now have custody of the appellants (Cook v. United States, supra, at p. 121).

Moreover, whereas in the Cook case, the Coast Guard was at least armed with statutory authority, here respondents had none. Without the power and authority of either law or treaty to seize appellants, they cannot have jurisdiction to detain them or deliver them to their ships.

IV

UNLESS APPELLANTS ARE RESTORED TO MEXICAN TERRITORY, THEY ARE ENTITLED TO THE RELIEF AUTHORIZED BY SECTION 243 (h) OF THE IMMIGRATION AND NATIONALITY ACT

Respondents assign two reasons for the purported inapplicability of §243(h) of the Immigration and Nationality Act (8 U. S. C. A. §1253 (h)). The first is that this section was never "intended to override the obligation imposed by Article XXIV" of the 1902 Treaty.

On the contrary, as we have attempted to show at great length, the provisions of Article III of the 1904 Extradition Treaty evidence expressly authorize asylum for citizens of the demanding nation who have committed crimes of a political character. Section 243 (h) simply implements Article III by affording the government a procedure for determining whether appellants are bona fide political refugees entitled to asylum in this country, if not in Mexico.

Next, respondents contend that appellants are not eligible for discretionary relief because they are not aliens "within the United States" within the meaning of §243(h), of the Immigration and Nationality Act. We submit that if the appellants are within the United States for the purposes of satisfying the 1902 Treaty, they are certainly here within the meaning of §243(h) (Quan v. Brownell, No. 12772 __ Fed. 2d __,

detain, examine and deport any aliens who enter the United States voluntarily or otherwise (Resp. Br. pp. 25-26).

It has been seen, however, that the 1902 Treaty is the authority under which the respondents purported to seize and detain appellants (See Exhibit I). If the 1902 Treaty is inapplicable, then each appellant having been paroled into the United States, must "forthwith ... be returned to the custody from which he was paroled ..." (§212(d) (5) Immigration and Nationality Act; 8 U. S. C. A §1282 (d) (5).)

D'Agostino v. Sahli (CCA 5, 1956), 230 Fed. 2d 668, upon which respondents rely so heavily, is not in point, first, because there is no competent evidence at bar that appellants were deported from Mexico; and secondly because appellants were paroled into the United States, and hence, did not "enter" within the meaning of the term "entry" as defined in 8 U. S. C. A. 10 (a) (13).).

B.

A Writ of Habeas Corpus Will Lie Not Only To Test The Legality of Appellants' Detention, But The Propriety of Their Disposition.

Respondents err in stating that a Writ of Habeas Corpus does not lie in the event they have legal custody. The District Court's order directs the delivery of appellants to their ships. Whether or not the 1902 Treaty is inapplicable the appellants

may test by way of Habeas Corpus, not only the propriety of their detention, but the legality of their disposition (United States v. Curran, 16 Fed. 2d 958, 960; Compare: Lue Chow Yee v. Shaughnessy, (DC N. Y. 1956), 146 Fed. Supp. 3, aff'm'd, 245 Fed. 2d 874; Leng May Wa v. Barber (CCA 9, 1953), 241 Fed. 2d 85; Lew Sing v. Barber (CCA 9, 1954, 215 Fed. 2d 906; Quan v. Brownell, supra).

VI

THE METHODS USED TO ENFORCE THE 1902 TREATY WERE UNLAWFUL, AND IT WOULD BE CONTRARY TO PUBLIC POLICY TO APPLY THOSE PROVISIONS TO APPELLANTS.

One of the most significant features of the government's brief is its plea for preserving the honor and dignity of the United States by upholding the 1902 Treaty. Of course it is necessary to uphold treaties; the question here is, which one? Can it be said, however, that there is less honor and dignity to be served the United States by adhering to the humanitarian-ism expressed in the 1904 Treaty, than by applying the crass commercialism of the earlier one? Are the concepts of liberty and Democracy to hold out different meanings for the victims of Communist tyranny and Fascist oppression? A world frought with idealogical struggles will pause to hear our answer.

On the other hand, we cannot fail to observe the

government's apparent indifference towards the manner by which appellants were brought within the reach of the 1902 Treaty.

Fortunately, courts will not lend their processes to public officials for the perpetration of illegal law enforcement (McNabb v. United States, 318 U. S. 332, 345; Roberts I., concurring in Sorells v. United States, 287 U. S. 435, 453, at p. 459; People v. Cohen, 44 Cal. 2d 434, 445-446). A judge must ensure a respect for the law in order to promote confidence in the administration of justice, and to preserve the judicial process from contamination (Justice Brandeis, dissenting in Olmstead v. United States, 277 U. S. 438, 471, at p. 485; cf. Delaney v. United States, 199 Fed. 2d 107, 113). In their enforcement of the 1902 Treaty, officials of the United States Immigration Service exceeded the authority entrusted to them by Congress; they violated Mexican sovereignty; and they even failed to confine their enforcement activities within the limits provided by the very treaty they sought to uphold. If the government is permitted, by means of its officers' illicit use of their powers, to effectuate the 1902 Treaty, not only will the government be placed in the role of law-breaker, but other illegal law enforcement practices will be thereby encouraged. There can be no honor and dignity from upholding a treaty where there is none in its enforcement.

CONCLUSION

For the foregoing reasons, the Order of the District Court denying the Petition for a Writ of Habeas Corpus should be reversed, with directions that said Court make its Order for the return of appellants forthwith to Mexico.

Respectfully submitted,

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